

## How to Defend a Remote Access To Software Sales Tax Audit, Part II

by Leah Robinson and Evan Hamme



Leah Robinson



Evan Hamme

Leah Robinson is a partner and Evan Hamme is an associate with Sutherland Asbill & Brennan LLP in the New York office.

This article is Part II of a series on defending a remote access to software sales tax audit. The authors trace the development of the Department of Taxation and Finance's position on this issue and note which taxpayer arguments have been more persuasive than others.

In Part I of this series, we shared our experience and insight regarding New York sales tax audits involving online services. We described our strategy of: (1) providing a highly technical description of how a service operates and what users can and cannot do; (2) emphasizing the role of employees or external data points, such as proprietary databases or communications links with third parties; and (3) comparing the primary purpose of the service to a more traditional (nontaxable) service.<sup>1</sup>

In this installment, we provide a chart of every Department of Taxation and Finance advisory opinion addressing online services since *Adobe Systems* (our so-called First of the Worst) from 2008.<sup>2</sup> The table shows that while the department's approach has evolved, taxability determinations remain somewhat unpredictable. However, the three factors discussed in Part I (summarized below) often tipped the scale in prior department opinions.

<sup>1</sup>Robinson and Hamme, "How to Defend a Remote Access to Software Sales Tax Audit, Part I," *State Tax Notes*, July 27, 2015, p. 361.

<sup>2</sup>TSB-A-08(62)S (Nov. 24, 2008).

### Let's Get Technical

Use or control of software is a taxable license.<sup>3</sup> But what does it mean to use or control software?

We would argue — and have argued — that use or control of software requires that the user actually access the underlying source code with the ability to alter it. The department has at times agreed with this approach.<sup>4</sup> More often, however, the department has considered actual access to underlying source code unnecessary: "Although Petitioner's customers do not have the right to 'alter, change, or control' the underlying code of the software itself, they gain constructive possession of the software and the 'right to use, control or direct the use' of the software, because they have the right to alter the content by filling in the form, without which the form is unavailable."<sup>5</sup>

In other words, the department's position has been that entering data and using search or performing functions constitutes "constructive" use or control of the underlying software. For example, in determining that one product offered by a seller was not taxable because the seller input the data but finding that another product offered by the same seller was taxable because the *user* input the data, the department said that the customers' ability to enter data, "whether or not exercised, provides the subscriber with the right to control the software."<sup>6</sup> While the department has repeatedly espoused that position, the taxpayer can respond by referencing the department's own conclusion in an advisory opinion

<sup>3</sup>See TSB-A-08(62)S; N.Y. Tax Law sections 1101(b)(6), (14), 1105(a), (b)(5); and 20 N.Y. Comp. Codes R. & Regs. section 526.7(e)(5).

<sup>4</sup>See TSB-A-10(6)S (Feb. 17, 2010) (access to data mining service not analyzed as remote access to software. The department stated: "The customer is given no right to use or control over the software. . . . For example, the customer has no ability to change any of the settings on the software. Petitioner also maintains dominion and control over the software at all times because customers may not change, sublicense, rent, sell, or distribute the software").

<sup>5</sup>TSB-A-13(22)S (Jul. 25, 2013) (access to bank template forms to be completed online considered remote access to software); see also *Electronic Mortgage Affiliates Inc.*, TSB-A-09(15)S (Apr. 15, 2009) (access to mortgage prequalification marketplace considered remote access to software).

<sup>6</sup>*XYZ Corp.*, TSB-A-09(8)S (Feb. 2, 2009) (online service facilitates the settlement of transactions in the primary and secondary syndicated

(Footnote continued on next page.)

addressing information services in which the department stated that “the distinction of how the information is initially transmitted to Petitioner [is] insufficient to warrant a different conclusion [(that is, results in the service being taxable)]. In neither method does the customer directly access Petitioner’s platform or software.”<sup>7</sup> We couldn’t have said it better ourselves.

### Think Outside the Shrink-Wrapped Box

A corollary to the need for a technical description is the need to focus on those elements of a service that simply cannot fit in a shrink-wrapped box. As discussed in Part I of this series, this includes substantial human effort by the seller’s employees and external data points such as proprietary databases or interconnections between or among third parties.

In a series of opinions, the involvement of the seller’s personnel was critical to the determination that the service was not access to software.<sup>8</sup> For example, in considering a logistics management service, the department held that while other services the petitioner provided were taxable access to software, one of the petitioner’s services was not taxable because it was essentially “outsourcing selected portions of a . . . logistics management function,” and that the petitioner “uses its own personnel and resources to provide transportation management to its customers.”<sup>9</sup> Another opinion demonstrates the importance of employee involvement: The department held that when the petitioner’s employees administered interview questions, the petitioner’s service was not taxable, but when the petitioner’s customer responded to automated questions on the Internet, the service was taxable.<sup>10</sup>

Similarly, the role of external data points cannot be understated. Many online services are essentially marketplaces (for example, services that allow customers to browse and compare car insurance or mortgage rates) or exchanges that connect various parties (for example, retailer/supplier logistics services). Those services would have no value without the interconnection or external data.<sup>11</sup> While the department regularly treats such services as remote access to software, that kind of characterization may not hold up if formally challenged. In addressing a corporate income tax (franchise tax) issue, an administrative law judge found the

travel intermediary product provided online by Expedia Inc. to be a service and not something else (such as software).<sup>12</sup> The service involved human efforts for arranging contracts with travel providers (marketplace and exchange functions) and involved access to an evolving proprietary database. In finding the offering to be a “service” as opposed to another activity, the ALJ’s decision provides insight as to how the courts are likely to characterize online services with mission-critical “out of the shrink-wrapped box” elements. Indeed, the *Expedia* decision calls into question the holdings in many previously issued advisory opinions.<sup>13</sup>

### Traditional Service

Finally, consider the types of services that New York tax law excludes from taxation or that the department has previously declared are not taxable. Some online services are substantially the same as more traditional services but are provided online. Showing that the only change is the delivery medium often helps support the nontaxability determination.<sup>14</sup>

Similarly, demonstrating that the primary purpose is a nontaxable service may help solve the riddle. For example, showing that a service is at its core a consulting service has proven successful,<sup>15</sup> as has showing that the primary purpose is a management or data processing service.<sup>16</sup>

**Convincing the department your service is not a software license doesn’t get you all the way to the end zone. You also have to demonstrate that your service does not fall within some other taxable service.**

But keep in mind that convincing the department your service is not a software license doesn’t get you all the way to the end zone. You also have to demonstrate that your service does not fall within some other taxable service. With online

bank loan market). Similar distinctions were made between two products offered in TSB-A-09(33)S (Aug. 13, 2009) (access to transportation logistics management) and TSB-A-13(30)S (Sept. 10, 2013) (online analysis of employee health services).

<sup>7</sup>TSB-A-13(24)S (Sept. 9, 2013).

<sup>8</sup>See, e.g., TSB-A-09(33)S (Aug. 13, 2009) (involvement of petitioner’s personnel changed outcome); and TSB-A-13(30)S (Sept. 10, 2013) (when customers respond to automated interview questions online, the service is taxable, but when petitioner’s personnel conduct an in-person interview, the service is not taxable).

<sup>9</sup>TSB-A-09(33)S.

<sup>10</sup>See TSB-A-13(30)S.

<sup>11</sup>See, e.g., TSB-A-15(20)S.

<sup>12</sup>DTA Nos. 825025, 825026 (Div. Tax. App. Feb. 10, 2015) (the plaintiff was represented by Sutherland). Note that “service” is not defined within either the franchise tax or sales tax statutes.

<sup>13</sup>For example, TSB-A-10(23)S (May 27, 2010); TSB-A-10(52)S (Oct. 18, 2010); TSB-A-11(17)S (June 1, 2011); and TSB-12(3)S (Feb. 27, 2012). Of course, ALJ determinations are non-precedential.

<sup>14</sup>TSB-A-12(22)S (Aug. 19, 2012) (taxpayer had a previous advisory opinion that its services were not taxable, and a new option for customers to receive service online did not change the conclusion).

<sup>15</sup>See, e.g., TSB-A-13(12)S (Apr. 23, 2013) (online investment management and risk management services not taxable as software).

<sup>16</sup>See TSB-A-10(14)S (Apr. 8, 2010) (primary function of online service was IT support and management; nontaxable); and TSB-A-15(20)S (May 26, 2015) (primary function of online service was translation of data; nontaxable).

services, the department often considers “information services” as a taxable alternative.<sup>17</sup> Information services are taxable when the information is derived from common sources but may be excluded from taxation when the information is personal or individual and not incorporated in a format available to third-parties.<sup>18</sup> Your audit presentation should keep potential treatment as an information service in mind.

#### **Chart of Department of Taxation and Finance Advisory Opinions**

The appendix that follows summarizes the 54 advisory opinions addressing online services that have been pub-

lished since late 2008. Those opinions provide insight as to how the department is likely to conclude for similar offerings. Of course, advisory opinions are simply statements of the department’s conclusion regarding a limited fact pattern and do not necessarily reflect the conclusion the courts would reach.<sup>19</sup>

---

<sup>17</sup>See, e.g., TSB-A-09(5)S (Jan. 29, 2009); TSB-A-09(14)S (Mar. 13, 2009); TSB-A-09(18)S (Apr. 27, 2009); TSB-A-10(40)S (Sept. 15, 2010); TSB-A-10(47)S (Sept. 29, 2010); and many others.

<sup>18</sup>See N.Y. Tax Law section 1105(c)(1).

---

<sup>19</sup>Compare, e.g., TSB-A-10(27)S (June 29, 2010) (advisory opinion concluding that digital video delivered on physical hard drive was taxable as tangible personal property) with *Matter of American Multi-Cinema*, DTA Nos. 823589, 823590, 823646 (Div. Tax App. Jun. 21, 2012) (ALJ determination that digital video delivered on physical hard drive was not taxable as tangible personal property). Robinson was co-counsel in the ALJ matter.

Appendix*		
Advisory Opinion	Product Being Analyzed	Department of Taxation and Finance's Advisory Opinion Conclusion
<i>Adobe Systems Inc.</i> TSB-A-08(62)S (Nov. 24, 2008)	WEBSITE FUNCTIONALITY — Online service allows a customer (a seller of online goods) to display product images so that products can be viewed in different colors and from different angles on customer's own store website.	Customers receive <i>constructive possession</i> of petitioner's software by accessing petitioner's website, even though no software source code is accessed or downloaded. The DTF wrote that, "the location of the code embodying the software is irrelevant, because the software can be used just as effectively by the customer even though the customer never receives the code on a tangible medium or by download." Taxable as software.
<i>MindLeaders Inc.</i> TSB-A-09(2)S (Jan. 21, 2009)	EDUCATION — Online interactive educational courses and associated products. Live support available for an additional fee.	Course program considered to be software, so use of the program considered access to software. Taxable as software.  Distinguishes online education opinion from 2006 (found to be nontaxable) because the 2006 product included human support at no additional charge.
<i>SkillSoft Corp.</i> TSB-A-09(3)S (Jan. 29, 2009)	EDUCATION — Online educational training; browse, read, and search capabilities for training materials; video-based training sessions.	Computer-based training: Customers receive <i>constructive possession</i> of petitioner's software because "all tasks relating to the use of the training materials and tracking are provided through the customer's use of Petitioner's software modules." Taxable as software.  Browsing and searching: While provided online, DTF analyzes this component as an information service (and concludes it is taxable).  Video-based training: While provided online, DTF analyzes this component as an educational course and concludes it is nontaxable.
TSB-A-09(5)S (Jan. 29, 2009) and TSB-A-09(14)S (Mar. 13, 2009)	CUSTOMER SERVICE — Automated voice calls service wherein customers send petitioner an electronic call list over the Internet. The customers, sometimes with the petitioner's help, create an automated voice message, and the petitioner's proprietary software makes automated calls (such as informing airline customers of a flight delay). Petitioner then delivers call reports to its customers electronically.	Because "the software is not delivered or transferred to Petitioner's customers by download or in a tangible format, and . . . may not be accessed online by Petitioner's customers for use," petitioner itself uses the software. Not taxable as a license of software. DTF also analyzes the petitioner's call report function as an information service and concludes the personal/individual exception applies.
<i>XYZ Corp.</i> TSB-A-09(8)S (Feb. 2, 2009)	DATA PROCESSING EXCHANGE — Online service facilitates the settlement of transactions in the primary and secondary syndicated bank loan market. Petitioner offers two products, one in which petitioner inputs data onto the platform directly and one in which customers input data into the platform.	The DTF determined the first product is not access to software because customers do not input data but the second product is access to software because customers have the ability to enter their data. The customers' ability to enter data, "whether or not exercised, provides the subscriber with the right to control the software." Fact that contract specifies that there is no license "is not controlling."
<i>Electronic Mortgage Affiliates Inc.</i> TSB-A-09(15)S (Apr. 15, 2009)	MARKETPLACE (MORTGAGES) — Online service allows mortgage brokers to interact with mortgage lenders for activities such as pre-qualifying potential borrowers.	Even though customers cannot "alter, change, or control" petitioner's software, customers have "the right to access the software in order to determine loan eligibility, ascertain the availability of certain loan products, and generate forms." In other words, use of the website is considered to be access to the underlying software. Taxable as software.  The DTF raises the possibility that the service is an information service but determines that it does not need to reach a conclusion because the service was considered a taxable license of software.
<i>TheMarkets.com LLC</i> TSB-A-09(18)S (Apr. 27, 2009)	MARKETPLACE (BROKER-DEALERS) — Online service compiles and creates client evaluations of broker-dealer services.	While the service is provided, at least in part, online, the online component was free of charge. Charges for receiving reports were taxable as information service because information for reports was derived from a common database.
<i>Jeffrey J. Coren</i> TSB-0A-09(19)S (May 21, 2009)	CONSULTING (SALES) — Online service generates reports related to weekly sales markdown recommendations based on data entered by customers.	Even though customers "cannot access or use the software to manipulate their data stored on the [petitioner's] server," the contract "provides that the customer is granted a license to use the [petitioner's] software." Taxable as software.
TSB-A-10(6)S (Feb. 17, 2010)	IT-RELATED DATA MINING & WAREHOUSING — Petitioner's service provides data mining and warehousing service that analyzes use of customers' websites and provides reports related to the success of customers' advertising.	While the service is provided online, the opinion does not focus on software, even though some software is downloaded to customers' computers. The DTF writes that "the customer is given no right to use or control over the software that is embedded on the customer's website. For example, the customer has no ability to change any of the settings on the software. Petitioner also maintains dominion and control over the software at all times because customers may not change, sublicense, rent, sell, or distribute the software." Instead, it is analyzed as an information service but determined to be nontaxable advertising.

<b>Appendix*</b> <i>(continued)</i>		
<b>Advisory Opinion</b>	<b>Product Being Analyzed</b>	<b>Department of Taxation and Finance's Advisory Opinion Conclusion</b>
<i>Homecare Software Solutions LLC</i> TSB-A-09(25)S (Jun. 18, 2009)	EXCHANGE (HEALTHCARE) — Online service allows homecare healthcare agencies and subcontractors to exchange information regarding potential jobs and to exchange patient data.	Agencies and subcontractors' ability to enter data into the web portal deemed constructive use of the underlying software. The DTF wrote that, "the accessing of HHA Exchange and the time and attendance system by Petitioner's customers constitutes a transfer of possession of the software, because the customer gains constructive possession of the software, and gains the 'right to use, or control or direct the use of,' the software." Taxable as software.
TSB-A-09(33)S (Aug. 13, 2009)	EXCHANGE (DELIVERY LOGISTICS) — Online service provides transportation and delivery management and also logistics management.  Customers using the transportation and delivery management service enter data online and then receive daily planning, execution, and settlement functions related to the management of their operations.  Customers using the logistics management service enter data online, and then all daily operational tasks of the selected logistics functions are performed by petitioner's staff using petitioner's resources.	Transportation and delivery service — "Although Petitioner characterizes its product as a 'service,' and contends that it does not sell software to its customers, this characterization is not controlling. Petitioner's customers obtain the right to access the software and input data in order to manage their transportation functions." Taxable as software.  Logistics management service — "Petitioner uses its own personnel and resources to provide transportation management to its customers." Analyzed as management service and determined to be nontaxable.
<i>Nat'l Football League</i> TSB-A-09(37)S (Aug. 25, 2009)	DATA PROCESSING (PAYROLL) — Online payroll processing service; customers input data and receive paychecks and payroll tax reports.	Customer has constructive possession of the software because it "has the right to use the software to upload and manipulate its payroll information, and to perform other human resource and administrative functions." Taxable as software.
TSB-A-09(41)S (Sept. 22, 2009)	MARKETPLACE (INSURANCE) — Online service allows customers to enter vehicle and owner information and receive automobile insurance quotes; customers can purchase insurance through the website.	Customers' activities of entering and submitting data considered access to petitioner's software, and therefore customers receive constructive possession. Taxable as software.
TSB-A-09(44)S (Sept. 24, 2009)	WEBSITE FUNCTIONALITY — Application service provider supplies website functionality for use on customers' own website that allows customers' website to display searchable database of real estate listings, branded in customers' name, even though all program functions are actually performed on petitioner's servers.	The DTF wrote that, "[petitioner's] customers have the right to access the software in order to use the databases provided by Client, or in the case of third-party advertisers, to provide web advertising services." Taxable as software.
TSB-A-09(52)S (Nov. 13, 2009)	MARKETPLACE (AUCTION) — Online auction registration fees for buyers and sellers.	Opinion does not focus on the use of software; registration fees to offer items at auction constitute nontaxable advertising sales; fees to register as buyer are not information services because the information is available to all individuals with Internet access free of charge.
TSB-A-09(55)S (Dec. 7, 2009)	CONSULTING (REAL ESTATE) — Online service generates reports enabling retailers, shopping centers, and real estate developers to assess potential success of a specific retail brand at a given location.	Even though customers enter data via petitioner's website and petitioner processes data using proprietary analysis and database content (ultimately providing report by download), opinion does not discuss remote access to software and instead focuses on taxability as an information service and concludes that the service is a taxable information service.
TSB-A-10(2)S (Jan. 20, 2010)	GAMING — Petitioner operates a physical establishment in which customers can play interactive computer video games and socialize.	Because videogames are software-based, the DTF concludes, with minimal analysis, that fees for playing were charges for the use of software. Taxable as software.
TSB-A-10(10)S (Mar. 16, 2010)	CUSTOMER SERVICE — Online automated speech service provides automated voice messages to provide client's customers product information (for example, warranty expiration) under license agreement.	"Petitioner's clients have the ability to access the software to at least make minor predefined configuration changes to the application. Further, depending on the particular voice application, the clients can use the software to interact with their customers (e.g., a voice application that forwards details of a caller's inquiry to a call center representative who is then able to use that information to help the customer)." Taxable as software.
TSB-A-10(14)S (Apr. 8, 2010)	IT-RELATED SUPPORT — Online IT support service involving IT asset monitoring, IT asset management, and offsite data backup management. Petitioner installs "agents" on customers' servers to collect data.	"The sales tax status of an integrated service depends on the primary function of the service. The primary function of Petitioner's integrated IT monitoring and management service is to assist a customer in the operation and management of its IT system." Not taxable.
TSB-A-10(20)S (May 6, 2010)	LITIGATION — Litigation support service, with some online elements and significant human involvement.	Even though involving some online service elements, analyzed as an information service and determined to fall within the personal/individual exception.

<b>Appendix*</b> <i>(continued)</i>		
<b>Advisory Opinion</b>	<b>Product Being Analyzed</b>	<b>Department of Taxation and Finance's Advisory Opinion Conclusion</b>
TSB-A-10(23)S (May 27, 2010)	EXCHANGE (CUSTOMER SERVICE) — Online service provides customers with off-site call center capabilities. Individuals can train to be call center customer service representatives who work from home, connecting to petitioner's customers' networks remotely through petitioner's service.	Customers' activities and customer service representatives' activities constitute constructive possession of petitioner's software because customer service representatives "obtain the right to access the software in order to manage their call center duties and select work times; the customer obtains the right to access the software in order to post work schedules and monitor and supervise the CIAs." Taxable as software.
TSB-A-10(28)S (July 2, 2010)	IT-RELATED CONSULTING — Consulting service provides central management of client's prewritten computer software and ability to transfer software to client's affiliates.	"The accessing of Petitioner's software by Client A's employees constitutes a transfer of possession of the software, because Client A gains constructive possession of the software and gains the 'right to use, or control or direct the use of' the software." Taxable as software.
<i>Anchin, Block and Anchin LLP</i> TSB-A-10(38)S (Aug. 20, 2010)	ADVERTISING — Online advertising service that allows customers to monitor, purchase, manage, and evaluate online advertising across multiple third-party ad networks.	While the service is provided, at least in part, online, the opinion does not analyze whether software is licensed. Instead, service is examined as an information service.
TSB-A-10(40)S (Sept. 15, 2010)	EXCHANGE (PROFESSIONAL NETWORKING) — Online professional networking service allows individuals to create and maintain online profiles and build contact networks. Basic membership is free; premium membership requires a paid subscription.	While the service is provided online, the opinion does not analyze whether software is licensed. Instead, the service is examined as an information service and determined to be taxable.
TSB-A-10(47)S (Sept. 29, 2010)	CONSULTING (INVESTOR ACTIVITIES) — Financial adviser support service provided by compiling market information relating to specific investors and sharing information with the investor's representatives (service options 1-3). Petitioner also provides an optional automated analysis function through its proprietary software (service option 4).	"By providing its customers with the right to customize reports by using software on its website, the Company's sales transfer the right to use prewritten software. However, [another aspect of petitioner's service] also involves the transfer of information to a customer. Under this circumstance, service option 1 constitutes an information service, rather the sale of prewritten software ( <i>Matter of DZ Bank</i> , Tax Appeals Tribunal, May 11, 2009)." The DTF determined that the personal/individual exception applied because financial information specific to customers' portfolios predominates over the information concerning the market at large. The DTF applied the same analysis and came to the same conclusion for service options 2 and 3.  Service option 4 constitutes online access to prewritten software because financial advisers can use analytical tools provided through the petitioner's Web portal. Taxable as software.
TSB-A-10(52)S (Oct. 18, 2010)	EXCHANGE (TRANSPORTATION LOGISTICS) — IT management service for railroads, rail shippers, and railcar leasing companies. Service involves processing and relaying information from client to an intermediary, "conveying information to purchasers from common database," and permitting clients to manipulate information.	While the service is provided, at least in part, online, aspects of the service that involve transfer of information to an exclusive intermediary constitute a personal/individual information service when information cannot be shared with others; information from common database is not personal/individual in nature. Information manipulation functionality granted to client constitutes remote access to software taxable as software license. Taxable as software.
TSB-A-10(57)S (Nov. 16, 2010)	IT-RELATED SUPPORT — Support and security services provided by trained IT personnel. The service involves installing and maintaining the customers' IT software and systems.	Personnel maintain customers' software and hardware and evaluate IT security systems in part remotely; services performed on software not taxable but when performed on hardware taxable; when not separately stated, entire sales price subject to tax. Analyzed as services performed on software rather than as a software product.
TSB-A-10(59)S (Nov. 23, 2010)	LITIGATION — Litigation support service, with some online elements and significant human involvement.	Even though provided, at least in part, online, the service is analyzed as an information service. Note that a substantial amount of human effort is involved in providing the service. Nontaxable due to the personal and individual exception.
TSB-A-10(60)S (Nov. 24, 2010)	LITIGATION — Litigation support service in which client accesses files hosted on seller's servers and uses software hosted on those servers to review, classify, and organize documents.	When clients use products to manipulate or classify documents, the client "accesses" the vendor's software. If customers pay only for the functionality to view documents, customers are not accessing software, and the service is a personal/individual information service. Management, consulting, manual data capture, and training services are not enumerated services and thus are not subject to sales tax if separately stated.

<b>Appendix*</b> <i>(continued)</i>		
<b>Advisory Opinion</b>	<b>Product Being Analyzed</b>	<b>Department of Taxation and Finance's Advisory Opinion Conclusion</b>
TSB-A-10(61)S (Dec. 17, 2010)	CONSULTING — Online investment and risk management advice service provided by gathering information and analyzing the information to provide financial advice.	While provided at least in part online, the DTF analyzed the product as an information service. The DTF decided that services that use publicly available information but involve significant expert analysis are not information services but nontaxable consulting services. Not analyzed as software.
TSB-A-11(14)S (May 3, 2011)	WEB FUNCTIONALITY — Authentication service and provision of digital authentication certificate to facilitate secure transactions and information exchanges online.	A digital certificate is a data file, not a software file. All software used to encrypt or decrypt the digital certificates already reside on customers'/end-user's systems. Not taxable as software.
TSB-A-11(17)S (June 1, 2011)	ADVERTISING — Hosted marketing service. Clients upload data to petitioner's servers. Software generates a list of recipients for an e-mail campaign, sends the e-mails, and permits clients to generate reports. Customers pay a setup fee and a messaging charge.	Petitioner's "set-up fee and the messaging charge appear to constitute consideration for the right to use the software. By providing its clients with these rights to use or control its Hosted Product for a consideration, Petitioner is making taxable sales of prewritten computer software ( <i>see</i> TSB-A-09[44]S)." Taxable as software.
TSB-A-12(2)S (Feb. 9, 2012)	PAYMENT PROCESSING — Petitioner permits individuals without a checking account to make bill payments in cash. The "un-banked" individual queues the transaction online and submits cash in person to a participating bricks-and-mortar merchant. The merchant confirms receipt and transfers funds to the petitioner for a commission.	The DTF decided the service is not subject to sales tax without providing substantial analysis, writing: "The Tax Law imposes tax on the retail sale or use of tangible personal property, including prewritten software, and certain enumerated services, including information services (Tax Law section 1105[a], [c]). [The service], as described above, is not among the enumerated services subject to tax."
TSB-A-12(3)S (Feb. 27, 2012)	EXCHANGE (SUPPLY CHAIN LOGISTICS) — Online service provides access to certified data pool that permits suppliers and retailers to transfer information, thus facilitating supply chain efficiencies.	A service that "facilitates information transfers between businesses and their customers" constitutes the sale of prewritten software because subscribers can "upload information," request "access to [a] trading partner's product information," and "view . . . product information" online. Taxable as software.
TSB-A-12(22)S (Aug. 29, 2012)	MARKETPLACE (INDUSTRY EXPERTS) — Service involves receiving requests from customers for particularized advice and then identifying experts in relevant fields and gathering their opinions concerning the customers' situations and needs.	In a prior opinion, the DTF had decided that petitioner's services were nontaxable personal/individual information services when its employees compiled the expert reports. <i>See</i> TSB-A-08(18)S. Here, the DTF did not change its position even though customers accessed and used software to compile the reports, because the client's use of software "is not necessary to receive [the] service, because the customer may opt to use one of Petitioner's research managers [and] [t]here is no separate charge to use the software." Not taxable.
TSB-A-12(24)S (Sept. 27, 2012)	CONSULTING (DATA) — The petitioner gathers and maps data from customers' data systems (accounting, finance, human resources), stores it in a confidential online data warehouse, and uses the data to create customizable reports. The reports essentially compare the customers' data systems with benchmarks created based on publicly available data (for example, labor statistics).	Petitioner's service gathers, maps, and stores customers' individual data, and petitioner's optional inclusion of publicly available benchmarks that the petitioner did not create was de minimis use of public data. Thus, the service constituted a personal/individual information service (nontaxable).  The DTF further wrote that "the ability for [petitioner's] customer to customize the reports has some attributes of the use of Petitioner's software by the customer in New York, [but] because the customer's use of the software is limited to parameters set by Petitioner . . . and this aspect is integrally related to [petitioner's] overall service . . . we conclude that Petitioner's transaction . . . constitutes the sale of an information service, and not the sale of prewritten computer software."
TSB-A-13(1)S (Jan. 8, 2013)	EDUCATION — Online driver's education course.	Service constitutes nontaxable education service in which online audio/visual presentation and telephone access to personnel indicate a student/teacher relationship is formed; legal benefit of certification entitling student to reduced driver's record points suggests student gains more than access to software. Not analyzed as software.
TSB-A-13(12)S (Apr. 23, 2013)	CONSULTING (INVESTMENT MANAGEMENT) — Online investment management and risk management service.	Integrated service of managing investments and risk constitutes nontaxable operations and management services in part because of labor-intensive aspects of business and significant investment in employee resources. Not taxable as software.

<b>Appendix*</b> <i>(continued)</i>		
<b>Advisory Opinion</b>	<b>Product Being Analyzed</b>	<b>Department of Taxation and Finance's Advisory Opinion Conclusion</b>
TSB-A-13(13)S (May 20, 2013)	LITIGATION — Online litigation and e-discovery service relating to a client's own documents.	The DTF did not analyze the litigation and e-discovery service, which provided access to database of a client's own documents and specific software used to organize documents, as software. Instead, the DTF concentrated on the information services aspect of the service and determined the personal/individual exception applied (nontaxable).
TSB-A-13(22)S (Jul. 25, 2013)	WEB FUNCTIONALITY — Online service provides blank template forms that can be populated with client data.	"Although Petitioner's customers do not have the right to 'alter, change, or control' the underlying code of the software itself, they gain constructive possession of the software and the 'right to use, control or direct the use' of the software, because they have the right to alter the content by filling in the form, without which the form is unavailable." Taxable as software.
TSB-A-13(24)S (Sept. 9, 2013)	EXCHANGE (HEALTHCARE) — Petitioner maintains an online platform that holds healthcare institutions' service data and validates, formats, and determines whether the data meets Center for Medicare/Medicaid Services eligibility criteria. Petitioner can pull the underlying data (or receive it in a flat file), or the customers can upload information via the petitioner's self-service website.	Whether the customers have their information extracted or upload the information themselves, the platform compiles, organizes, and analyzes the data. Even though provided, at least in part, online, the DTF analyzed whether the service was an information service and determined that it is but is subject to the personal/individual information services exception. "We find the distinction of how the information is initially transmitted to Petitioner insufficient to warrant a different conclusion. In neither method does the customer directly access Petitioner's platform or software." Not taxable as software.
TSB-A-13(30)S (Sept. 10, 2013)	CONSULTING (EMPLOYEE HEALTH) — Service provided either online or in person analyzes customers' employee health services efforts, either through in-person interview or using online reporting technology.	When the interview responses are input by the customers online, the service constitutes remote access to software. Taxable as software.  When an employee of petitioner conducts an interview in person, the interviews and reports are part of a personal/individual information service and are not taxable.
TSB-A-13(32)S (Sept. 10, 2013)	LITIGATION — Provides and maintains a hosted software solutions system that permits law firms to maintain and organize case management files, track and process billing, handle e-mails and e-filing documents, and handle personnel records.	The DTF did not provide thorough analysis, but found that the functionality granted to clients constitutes sufficient control of the software. Taxable as software.
TSB-A-13(37)S (Oct. 17, 2013)	DATA PROCESSING — Online service maintains safety and exercise/drill information.	Customers' ability to search and retrieve information and receive analysis over the Internet for use in safety reports constitutes remote access to software. Taxable as software.
TSB-A-14(3) (Jan. 27, 2014)	EXCHANGE (FINANCIAL RESEARCH) — Online service aggregates financial research information from a variety of sources and provides more convenient access via single Web sign-on credential.	While provided online, the DTF analyzed whether the service is an information service and concluded that it is a taxable information service because petitioner's system essentially collects information from various sources and provides it conveniently for users. Not analyzed as software.
TSB-A-15(1)S (Jan. 15, 2015)	CONSULTING — Online service collects feedback on client products from across the Internet, filters the information, and transmits the feedback to the client; additional charges for online functionality to run reports and obtain new information over the Internet.	Petitioner's service is designed to acquire feedback in order to promote sales of its clients' products; the service thus qualifies as a nontaxable advertising service.  Petitioner's additional charges add an analysis function for the feedback that is sufficient to constitute remote access to software. Taxable as software.
TSB-A-15(2)S (Apr. 14, 2015)	HARDWARE FUNCTIONALITY — Online hosting and virtual operation of system service.	The DTF determined that the service was multifaceted and thus analyzed customers' primary purpose in purchasing the service. Despite permitting access to some prewritten software, the customers primarily seek hardware functionality (additional computing power), which is neither tangible personal property nor an enumerated service. Not taxable as software.
TSB-A-15(5)S (Mar. 23, 2015)	CUSTOMER SERVICE — Online service communicates product recall information to consumers and manages recall information.	While provided online, permitting transfer of information between parties and access to database constitute taxable information services. Not analyzed as software.
TSB-A-15(9)S (Mar. 19, 2015)	IT-RELATED — Petitioner provides standardized modifications/upgrades to software and technical support and software maintenance services.	If the upgrades are standardized modifications, a "standardized modification of prewritten software is itself prewritten software." In this circumstance, taxable as software. If, however, "any reasonable fee for software maintenance service (e.g., technical support) would not be subject to sales tax" if separately stated, the service would not be taxable as software.



<b>Appendix*</b> <i>(continued)</i>		
<b>Advisory Opinion</b>	<b>Product Being Analyzed</b>	<b>Department of Taxation and Finance's Advisory Opinion Conclusion</b>
TSB-A-15(12)S (Mar. 17, 2015)	DATA PROCESSING — Online service reformats mailing lists for transmission to third-parties that sell the mailing list information.	While provided online, merely reformatting the mailing list data does not constitute an information service; sending the reformatted data electronically does not cause the service to become a taxable telegraphy/telephone service. Not analyzed as software.
TSB-A-15(20)S (May 26, 2015)	EXCHANGE (DROP SHIPMENT LOGISTICS) — Online service facilitates customers' drop shipment programs by transferring and translating information and messages between merchants and suppliers.	While provided online, the primary function of petitioner's integrated services was the translation of data from a format compatible with merchant computer systems into a format compatible with supplier computer systems. The translation component constitutes a nontaxable data processing service. Not analyzed as software.
TSB-A-15(25)S (June 3, 2015)	GAMING — Electronic gaming products available for download over the Internet or accessed remotely; sales of subscription cards used to obtain gaming products.	Downloaded games "are prewritten computer software products" and are taxable.  For remotely accessed games, "the customer is provided access to pre-written software that either extends or enhances the purchaser's on-line gaming experience (such as accessing additional levels to explore or interact with)." Taxable as software.
TSB-A-15(28)S (July 9, 2015)	EXCHANGE (ONLINE MEETINGS) — Online service coordinates online meetings and conferences.	The DTF focused on whether the service was a telecommunications service subject to the telecommunications excise tax. After determining it is not a telecommunications service (because customers provide their own Internet service providers), the DTF noted that although some code and instructions are transferred to the customers, the product is not the sale of software "[i]n light of the limited functionality of the software provided to customers in the overall context of petitioner's products." Not analyzed as software.

\*This appendix is by Leah Robinson and Evan Hamme.

☆